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Environmental Litigation Threatens Endangered Species

by Dana Joel Gattuso

You know environmental lawsuits have spun out of control when barge activity on the Missouri River must come to a halt to preserve habitat for the nesting piping plover.

A federal district court decision ordering the Army Corps of Engineers to reduce water levels from the Missouri River dams so piping plovers, least terns and pallid sturgeons can breed on sandbars ¹ threatens to decimate the river's shipping industry, endanger water quality and reduce water supplies and power for communities in downstream states. ²

The ruling follows a lawsuit filed by the special interest group American Rivers and nine allies that sued the Army Corps under the Endangered Species Act (ESA) for failing to reduce water levels to protect the habitat of endangered species. ³

Judge Gladys Kessler, who wrote last month's original court decision, concedes significant human sacrifice: "Navigation will be interrupted for the remainder of the summer and barge companies will lose revenues. Water quality may be affected and there may well be higher water purification costs. Hydroelectric resources will be affected, and consumers may suffer higher costs." ⁴

But these hardships, in Judge Kessler's view, can't compete with the species at issue because, in her words, "there is no dollar value that can

be placed on the extinction of an animal species - the loss is to our planet, our children and future generations."⁵ That is to say: the needs of a sturgeon are naturally placed so far above human needs that cost assessments should not even be considered.

Sadly, nonsensical litigation such as this is not rare. Rather, it is an epidemic that not only compromises human needs but, ironically, compromises the protection of endangered species. ESA lawsuits are so routine that U.S. Fish and Wildlife Service (FWS) staff spend more time and dollars handling litigation than saving endangered species.⁶ The FWS reports that as much as two-thirds of its budget for placing endangered species on the protection list is consumed fulfilling court orders and settlement agreements. Its \$6 million budget for designating critical habitat was depleted by the end of July.⁷ FWS officials are asking Congress to authorize funds from other endangered species protection programs so they can complete pending court orders.

The environmental litigation craze dates to the Clinton Administration. In 2000, Clinton's FWS Director Jamie Rappaport Clark was forced to place a moratorium on 25 endangered species under consideration for protection so she could handle a flood of court orders. Calling it a "biological disaster," she protested that litigation "has turned our priorities upside-down. Species that are in need of protection are having to be ignored."⁸

Judges' decisions, constrained by the rigid language of the ESA, also muddle priorities and discourage scientific determinations. Nowhere is this more true than lawsuits over "critical habitat designations" - a contentious mandate under ESA that frequently requires the protection of an endangered species' habitat over protection of the endangered species. In fact, one court ruled that FWS must designate critical habitat for endangered species even if it is considered a lower priority than other protection activities.⁹

Small wonder that the National Research Council has concluded, "designation of critical habitat is often controversial and arduous, delaying or preventing the protection it was intended to afford."¹⁰ Yet the majority of environmental civil cases filed are over designations, and in most cases, over missed designation deadlines due to resource constraints.¹¹

Environmental groups fuel the judicial absurdity and artfully use the courts to drive their political agenda. They also know it pays to take an agency to court. As required by law, attorney fees are funded by taxpayer dollars every time a plaintiff wins a case. That can mean big bucks. Data from the U.S. Department of Justice, as reported by The Sacramento Bee,

shows that environmental lawyers typically charge \$150 to \$350 an hour. In the 1990s, the average award was \$70,000, though tax-financed awards of \$100,000-plus are not uncommon.¹²

Congress must put an end to this litigation rage. Without needed reforms, frivolous litigation will continue to jumble priorities, sacrificing methods that truly protect species and wildlife.

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Footnotes:

1 Damon Franz, "Minnesota Court Upholds Low-Flow Ruling," Greenwire, August 5, 2003.

2 Damon Franz, "Judge Denies Government Appeal to Maintain Higher Flows," Greenwire, July 15, 2003.

3 Libby Quaid, "US Looks to Reverse MO River Ruling," Associated Press, July 14, 2003.

4 American Rivers, et. al. v. U.S. Army Corps of Engineers, Civil No. 03-241, Memorandum Opinion, U.S. District Court for the District of Columbia, Washington, D.C., July 12, 2003.

5 Ibid.

6 "Endangered Species Act 'Broken' - Flood of Litigation Over Critical Habitat Hinders Species Conservation," press release, U.S. Department of Interior, May 28, 2003 and Testimony of Craig Manson, Assistant Secretary for Fish and Wildlife and Parks, before the U.S. Senate Subcommittee on Fisheries, Wildlife and Water, Committee on Environment and Public Works, Washington, D.C., April 10, 2003.

7 "Endangered Species Act 'Broken' - Flood of Litigation Over Critical Habitat Hinders Species Conservation" and "Farmers, Ranchers Call for ESA Reform," Environment and Energy Daily, July 18, 2003.

8 Tom Knudson, "Litigation Central: A Flood of Costly Lawsuits Raises Questions About Motive," Sacramento Bee, April 24, 2001.

9 "Endangered Species Act 'Broken' - Flood of Litigation Over Critical Habitat Hinders Species Conservation."

10 "Endangered and Threatened Wildlife and Plants; Notice of Intent To Clarify the Role of Habitat in Endangered Species Conservation," U.S. Department of Interior, Federal Register, Vol. 64, No. 113/Monday, June 14, 1999/Notices [Page 31871-31874].

11 Testimony of Craig Manson.

12 Knudson.